Borden, Inc., Borden Chemical Division *and* Patricia D. McClendon. Case 9-CA-14882

August 20, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 23, 1981, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard at Louisville, Kentucky, on August 20, 1980.

The charge in this proceeding was filed by Patricia D. McClendon, sometimes hereinafter referred to as the Charging Party, on February 12, 1980, and the complaint issued on March 26, 1980. Counsel for the General Counsel moved to withdraw the allegation in paragraph 5 of the complaint, which alleges that the Charging Party was unlawfully laid off. Hearing no objection to this motion, the General Counsel's motion is granted. Accordingly, the remaining issue to be decided is whether Respondent discharged McClendon because of her protected concerted activities in making complaints to Respondent regarding job safety and working conditions on behalf of herself and Respondent's employees.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, has, at all times material herein, engaged in the manufacture and sale of formaldehyde, methanol, adhesives, and industrial resins at its Louisville, Kentucky, facility. During the 12-month period ending December 31, 1979, Respondent, in the course and conduct of its business operations, sold and shipped from its Louisville, Kentucky, facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a facility of the Borden Chemical Division of Borden, Inc., which produces adhesive resins. It is a lab facility which is involved in the development and quality control of phenolic resins and related formaldehyde products.

The Charging Party's initial employment with Respondent commenced in September 1977 and ended in October 1977, after she quit for personal reasons. Thereafter, in November 1977, she was again employed by Respondent as a lab technician until December 12, 1979.[1]

McClendon worked on a project known as Particle X. This is a friction particle placed on brake linings where normally cashew oil would be utilized. The product consists, *inter alia*, of 20 to 25 percent high free phenol, Furfuraldehyde, aniline hydrochloride, and an acid diethyl sulfate. The diethyl sulfate is an acid used as a catalyst, and when mixed with the other components it causes irritating and noxious fumes. For this reason the work is performed under a hood which is a system that circulates and ventilates the fumes to the outside, when it is working properly.

On November 7, McClendon wrote a one-page letter to her supervisor, DoBosh, in which she claimed that employees were complaining to her concerning an odor generated by her work, and named employees who complained about coughing, running eyes, and itching. She also stated that some people were getting headaches, and she informed DoBosh that she is, "holding up on making any more Particle X until this situation is discussed." Furthermore, she stated that this might be the source of her health problems. A carbon copy of this letter was sent to Dr. Golden, director of research.

On November 8, McClendon issued a seven-page document setting forth in greater detail, the subjects referred to in her letter the day before. This letter also requested that she be tested medically and that the ventilation system be tested. Carbon copies of the letter were sent to Golden, Hinkle, employee relations manager, and Chan-

[1] All dates are in 1979 unless otherwise indicated.

dimouli, the liaison between the lab and site management.

On November 12, McClendon was told by Golden not to make any more Particle X until the situation could be checked out. DoBosh was called into Golden's office to discuss both letters. DoBosh testified that he regarded the report by McClendon as going over his head and that there was no basis for the report. He also testified that he felt McClendon "had this strange trait of going over people's heads to get something done or to gain attention or to get attention."

On November 20, McClendon was examined by Respondent's physician, Kremer, who gave her a note which she presented to DoBosh. The note stated that McClendon could return to work but she was to avoid phenol exposure. It further stated that she was to return to this physician on December 10. According to her testimony, when McClendon presented the note to DoBosh he commented, "Well, what the hell kind of work can you do if you can't work with phenol." He also stated, "Everything we have has phenol in it. What can you work with?" McClendon testified that she told DoBosh that perhaps the doctor had overreacted and that he really meant she was not to work on the Particle X project, but she felt she could perform her regular duties.[2]

Golden testified that, because of McClendon's complaints, Respondent was put on operation alert status, necessitating that a toxicologist[3] test the premises. Preparation of Particle X ceased. On November 15, the toxicologist tested the premises and found that the airborne concentration of sulfur dioxide and diethyl sulphate were below the detectable limit at all locations inside the building. The toxicologist also found that, while there was a nontoxic odor generated by the Particle X project, it was able to reenter the ventilation system because of negative pressure in the building. He recommended that the negative pressure be studied and that standard precautions be followed in handling phenol.

McClendon was put on a temporary layoff status at full pay during the investigation. She was also referred by Dr. Kremer to a dermatologist for allergy tests with the chemicals with which she was working, pursuant to her request. DoBosh instructed McClendon not to report back for work until the company doctor gave his approval. According to the testimony of McClendon, when she asked to see Hinkle, DoBosh replied negatively and stated that she had gone over his head too many times already, that he was the supervisor and he was responsible for her.

Subsequently, McClendon called Hinkle on the telephone. She asked him if she was being fired; he responded negatively but that it would depend on the results of the tests whether she could return to work. She stated she felt that other technicians should be told of this. Hinkle responded that they would issue a memorandum saying that she was on company paid leave, for purposes of seeing a physician, and was not fired. McClendon told Hinkle that she thought all this could have been avoided if the company physician had followed up on previous testing in May, and if management had been more conscious of safety measures. McClendon also commented that she believed it was the Company's attitude that her health was not as important as their patent, and that is why she wanted a second opinion. Hinkle told McClendon to contact him after she had seen the dermatologist and gotten the results of the tests.

On November 27, McClendon received a phone call from Hinkle who asked the results of her test. She replied that she would not know until the next day. Hinkle stated that she could come back to work if the dermatologist, Dr. Molloy, wrote a note stating that it was all right for her to return. McClendon stated that she would wait to see the results of the tests.

On November 28, McClendon saw Dr. Molloy. Her tests proved negative, and Molloy told her that he would write a letter to Dr. Kremer and leave the decision up to him with respect to her returning to work. On December 10, McClendon went to see Dr. Kremer, and he released her to return to work, and gave her a note to present to management.

On December 11, McClendon met with Hinkle. Up until this point in the chronology of this case, the testimony and the facts adduced therefrom are not in dispute. It is on December 11 and thereafter that the versions of McClendon's termination differ.

McClendon met with Hinkle on December 11, at which time she presented him with her physician's release. According to her testimony, Hinkle told her that he was not sure if DoBosh was ready for her to come back to work, and he stated he would have to contact DoBosh. Hinkle then advised McClendon that she would be returning to work under the same conditions which prevailed when she originally issued her complaints. She responded it was difficult for her to believe this, in view of the findings in the toxicologist's report that there was a ventilation problem, and that if not for her safety, how could Respondent expose the entire facility to these fumes? She testified that she told Hinkle in spite of this, that, she would do it (return to work), she needed the job, and she did not have any other way of supporting herself. She then questioned Hinkle as to why she had not received more appropriate medical tests, and Hinkle stated that he had a note allowing her to return to work. According to McClendon, Hinkle then suggested that perhaps she could return to work and later testing would be done. She approved of this. Hinkle then stated, according to her testimony, that she could tentatively return to work the next day, if DoBosh approved. McClendon told Hinkle that she was scheduled to visit a doctor that day and DoBosh would probably be upset if she were to report to work, and failed to do so because of the doctor's appointment. Hinkle agreed and stated he hoped it would be her last doctor's appointment for a while, and told her he would check with DoBosh and get back to her. Later that afternoon, she received a telephone call from Hinkle's secretary in which she was instructed to report the following morning.

Hinkle's version is different from that of McClendon. He testified that McClendon, on December 11, was told to return to work in view of the fact that there was no

[2] The record reflects that working with phenol was her regular, and perhaps only, duty.

[3] Sometimes referred to in the testimony and briefs as a hygienist.

evidence of any allergy brought about by the chemicals with which she was working. McClendon wanted a guarantee that she would not work with Particle X or anything resembling it; i.e., phenolic resins. Furthermore, she disagreed with the medical findings and wanted more tests taken. Hinkle advised her that he had a medical release for her to return to work and told her that the atmosphere was not toxic. Furthermore, Hinkle advised her that Respondent had accommodated her excessive absenteeism and her medical examinations. He again invited her to return to work, and she declined, reiterating her conditions. Thereafter, Hinkle checked with Dr. Golden and was advised that there was no work available for a lab technician except that which involved phenolic resins. Moreover, Respondent could not tolerate an employee insisting upon what duties he or she would perform.

According to Hinkle, on December 12, McClendon was advised that her conditions would not be met, but she was free to return to work. She again declined the offer, and asked what would happen to her now. Hinkle told her she had the right to resign, but she refused, and stated she would be fired first. Thus she was advised that Respondent had no alternative but to terminate her. She was also advised that Respondent would not oppose her application for unemployment. According to the testimony it is company policy not to oppose employees' unemployment benefit applications.

McClendon testified that on December 12, when she reported to Hinkle's office, he began the conversation by stating that they could talk for hours but "what it boiled down to was that they were letting her go." Thereafter her testimony pretty much conforms to Hinkle's, although she testified that he stated Respondent would say to unemployment or to anybody that they let her go "for sporadic absences" and she felt uncomfortable working with chemicals.

Conclusion and Analysis

My view of the issue differs from that of Respondent and the General Counsel. In my opinion McClendon's acts of delivering the two letters to management fall within the purview of protected concerted activity. Thereafter, McClendon began to repeat a pattern, which she had engaged in historically during her tenure with Respondent, of visiting batteries of doctors for a variety of illnesses, some real perhaps, and certainly in many cases imagined. The record is replete with references to McClendon's health problems, including, but not limited to, bursitis, allergies, sinusitis, arthritis, and toxic poisoning. Neither Respondent nor any of the physicians were able to satisfy her, both with respect to their methods of examination and the diagnosis resulting therefrom. The record is also laden with physicians' names. Fink, Respondent's former physician and McClendon's general practitioner, Kremer, the Respondent's current physician, Molloy, a dermatologist to whom Dr. Kremer referred McClendon, Belvins, an ear, nose, and throat physician chosen by McClendon, Osborne, a rheumatologist selected by McClendon, and University Hospital which conducted X-rays and blood work at her request.

The fact is, Respondent accommodated McClendon's every whim and desire. It closed down the entire Particle X project, based on the information she furnished in her letters, and put her on leave with pay, while it could investigate and correct any possible dangerous conditions.

The toxicologist's report which reflected that there were no airborne particles was shared with her.

In my opinion, it defies logic that Respondent, after bending over backwards to accommodate McClendon, would then fire her for writing the letters. The probative evidence convinces me that Respondent was not motivated to terminate McClendon because of any concerted activity she had engaged in.

In my opinion McClendon was an unreliable witness and I discredit her. She consistently testified in a vague and conclusionary manner. Furthermore, she constantly opinionated and characterized in her testimony. On many occasions during cross-examination she would not answer direct questions but continued to volunteer opinions. Therefore I discredit McClendon's versions of the December 11 and 12 meetings with Hinkle, which gave rise to her termination.

I credit Hinkle's versions of the December 11 and 12 meetings with the Charging Party, and I find that she refused to return to work unless her conditions and guarantees were met. Specifically, she took the position that she would not work with Particle X or phenolic resins, and she disagreed with medical findings and wanted more tests. I fully credit Hinkle and Golden and accept their versions of the events as testified to by them. Both of these witnesses answered questions directly and did not appear to be attempting, in any way, to embellish or embroider.

In conclusion, it is my opinion that Respondent bent over backwards to meet McClendon's demands and successfully met those demands. When Respondent allayed all of her fears, that was not enough for McClendon, she wanted more. She read the toxicologist's report. She was not acting in good faith.[4] Cf. *Modern Carpet Industries, Inc.*, 236 NLRB 1014 (1978), affd. 611 F.2d 811 (10 Cir. 1979). Respondent invited McClendon to return to work but she insisted that she be able to dictate conditions and refused to return to work. Therefore Respondent had no alternative but to terminate her. Accordingly, I will recommend that the complaint be dismissed in its entirety.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent terminated the Charging Party for cause, and did not engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

[4] The 10th Circuit discusses the good-faith belief by the employees.

ORDER[5]

It is recommended that the complaint herein be, and it hereby is, dismissed in its entirety.